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COURT OF CRIMINAL APPEALS
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No. PD-0563-19

IN THE TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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CASEY ALLEN MARTIN,

APPELLANT

v.

THE STATE OF TEXAS,

APPELLEE

On Discretionary Review from the Second Court of Appeals of Texas, No. 02-18-00333-CR, Appeal in Cause No. 1515753D in the Criminal District Court No. 1 of Tarrant County, Texas, the Honorable Elizabeth Beach, Presiding

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STATE'S BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

The State agrees with Appellant's "Identity of Parties and Counsel." *See* Appellant's Brief, 2. However, the State adds the following appellate counsel:

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STATEMENT OF THE CASE

The State charged Appellant Casey Allen Martin with possession of a controlled substance, methamphetamine, of one gram or more but less than four grams. CR 5. Martin filed a motion to suppress, which the trial court denied after a hearing. CR 13-20. Martin pleaded guilty to the charged offense, but retained the right to appeal the trial court's denial of his motion to suppress. CR 24, 35. Pursuant to the plea agreement, the trial court deferred adjudication of Martin's guilt and placed him on community supervision for seven years. CR 35.

Martin appealed the denial of his motion to suppress. *See Martin v. State*, 576 S.W.3d 818 (Tex. Crim. App. 2019, pet. granted). In a published opinion, the Second Court of Appeals affirmed the trial court's denial of Martin's motion to suppress. *Id.* This Court granted Martin's petition for discretionary review on October 9, 2019. *See Martin v. State*, PD-0563-19 (Tex. Crim. App. Oct. 9, 2010) (White Card).

STATEMENT OF FACTS

Bedford Fire Department Dispatched to Fire Emergency

On August 31, 2017, at approximately 10:49 p.m., Firefighter Darren Cook of the Bedford Fire Department was dispatched to a fire at an apartment complex. RR 2:6-7. Once they arrived at the scene, Cook and his team noticed smoke and water flowing from the door of apartment 214. RR 2:8. The firefighters retrieved their equipment, entered the apartment, and put out a fire that was burning on the stove. RR 2:8. The apartment's occupant—Appellant Casey Allen Martin—had apparently fallen asleep while he was cooking. RR 2:8.

After the fire was extinguished, the firefighters began to ventilate the apartment to clear out the built-up smoke. RR 2:8-9. They ventilated one room at a time, starting with the living room. RR 2:9. As the firefighters ventilated each room, they noticed multiple firearms throughout the apartment. RR 2:9-10. The presence of firearms caused the firefighters to work slower to ensure their safety. RR 2:15. The electricity to the apartment had been shut off to eliminate any electrical hazards caused by the water sprinklers within the apartment, so the firefighters had to use helmet lights to see through the smoke. RR 2:10. The dark conditions within the apartment further exacerbated the firefighters' plight. RR 2:10.

Firefighter Cook Discovers Weapons and Drug Paraphernalia in Plain View

When Cook was in the back bedroom of the apartment, he discovered a loaded, assault-type rifle, which caused him to work even more cautiously. RR 2:15-16. Aside from the multiple firearms, Cook also observed what he believed to be evidence of drugs or drug paraphernalia in plain view within the bedroom. RR 2:16-17. Cook had been trained to recognize drugs and drug paraphernalia and he had encountered them before when responding to fire scenes. RR 2:17-18. The evidence of drugs/paraphernalia he observed in this case consisted of: (1) a torch; (2) "drug-like little baggies"; (3) a glass jar full of unidentified pills; (4) a glass with some drug residue in it; and (5) a butane lighter. RR 2:17-19. The contraband was located on a dresser and in an open closet. RR 3:13-19, State's Exhibits 9-15 (Photographs of the Identified Items). The combination of possible narcotics, multiple firearms, and flammable liquid placed Cook and the other firefighters "on high alert." RR 2:24. Due to the presence of drug paraphernalia and firearms, Cook called the Bedford Police Department to assist the fire department. RR 2:16.

Officer Hart Observes Drug Paraphernalia in Plain View

A Bedford Police Department officer—Officer Hunter Hart—arrived while the firefighters were still at the scene. RR 2:19. When Officer Hart arrived, the firefighters were still ventilating the apartment and trying to control the scene. RR 2:20-21. At first, Officer Hart did not know any of the details surrounding the call—

he only knew that he was assisting with a structure fire. RR 2:33. It was not until he made contact with Cook's battalion chief that Officer Hart learned about what was transpiring inside the apartment. RR 2:34. The battalion chief told Hart that the firefighters had observed "a lot" of firearms and a "bunch" of drug paraphernalia in the apartment. RR 2:34. The battalion chief also expressed that he was in fear for his team's safety. RR 2:34. At that point, Hart entered the apartment to help the firefighters safely complete their duties. RR 2:34. Hart did not know whether anyone other than the firefighters was inside the apartment, although he did observe Martin sitting outside. RR 2:34-35.

Once Hart was inside the apartment, he conducted what he described as a "protective sweep" to ensure there was no one inside the apartment who posed a threat to the firefighters. RR 2:36. As he moved through the various rooms, following the path the firefighters had previously made, he too observed multiple firearms scattered throughout the apartment. RR 2:37. In the back bedroom, Officer Hart observed the following drug paraphernalia, in addition to the items noted by Cook, in plain view: (1) bongs used to smoke marijuana or some type of narcotic; (2) brown residue in the bongs, indicating the bongs had been used to consume marijuana or narcotics; and (3) a baggie containing a white, crystal-like substance. RR 2:37-39. When viewing the apartment and drug paraphernalia, Officer Hart did not exceed the scope of the administrative search conducted by the Bedford Fire

Department as they were ventilating Martin's apartment.

The Bedford Police Department Obtains and Executes a Search Warrant

After observing these items—and recognizing them as evidence of something criminal—Officer Hart decided to "freeze" the scene. RR 2:39. He contacted a supervisor to see whether the supervisor wanted Officer Hart to apply for a search warrant. RR 2:39. The narcotics unit was called to the scene to aid in that determination. RR 2:45. Investigator Versocki with the narcotics unit subsequently entered Martin's apartment and viewed the drug paraphernalia in plain view. RR 3:23-24, State's Exhibit 16 (Search Warrant Affidavit). Investigator Versocki's conduct in the apartment did not exceed the scope of the administrative search conducted by the Bedford Fire Department as they were ventilating Martin's apartment. A search warrant was eventually obtained and executed. RR 3:20-24. During the execution of the search warrant, law enforcement officers found the methamphetamine which formed the basis for the indictment in this case. RR 2:59.

The Trial Court's Findings

After denying Appellant's motion to suppress, the trial court entered findings of fact and conclusions of law. CR 16-20. The court made the following findings, among others:

Findings Regarding Firefighter Cook's Entry and Observance of Paraphernalia

- On August 30, 2017, at approximately 10:47 PM BFD [Bedford Fire Department] was dispatched to a fire alarm call at an apartment complex at 1009 Amherst.

- BFD located the source of the fire at apartment [214] which was on the second floor of the apartment complex.

- BFD made contact with the defendant and the defendant indicated that he fell asleep while cooking food on the stove.

- BFD made entry into apartment [214].

- BFD began its efforts to extinguish the fire and ventilate the apartment.

- BFD attempted to remove blankets from a window in a back bedroom for ventilation purposes.

- Firefighter Cook located multiple firearms on a futon in front of that window.

- Firefighter Cook became concerned about his safety and the safety of other members of BFD.

- The presence of these firearms hindered BFD's ability to do their job.

- BFD began to slow down their efforts and took a look around.

- BFD then observed multiple firearms and ammunition scattered throughout the apartment and had additional safety concerns.

- In his 16 years of experience Firefighter Cook has learned to recognize drugs and drug paraphernalia.

- Firefighter Cook also observed drug paraphernalia in the back bedroom in plain view.

- Firefighter Cook observed pipes with drug residue in a closet and small plastic baggies on a side table.

- BFD then called BPD [Bedford Police Department] due to his safety concerns and the drug paraphernalia in plain view.

- BFD called BPD intending to have BPD seize the drug paraphernalia and secure the weapons as this is outside the scope of the BFD's experience and responsibility.

Findings Regarding Officer Hart's Entry and Observance of Paraphernalia

- Office[r] Hart was dispatched to a structure fire at 1009 Amherst [214] at 11:36 PM on August 30, 2017.

- When Officer Hart arrived at the apartment complex, he made contact with the BFD Battalion Chief.

- The Battalion Chief indicated to Officer Hart that he was concerned about the safety of BFD inside the apartment.

- The Battalion Chief told Officer Hart that BFD could not ventilate the back room of the apartment because there were blankets over the windows and that BFD had located guns, bullets, and drug paraphernalia inside the apartment.

- Officer Hart entered the apartment to secure it for the safety of BFD.

- Officer Hart inspected each room of the apartment ending with the back bedroom.

- During Officer Hart's entry into the apartment, Officer Hart observed drug paraphernalia in the back bedroom in plain view.

- Officer Hart described the paraphernalia as a pipe or bong containing drug residue which is commonly used to ingest narcotics, a plastic baggie containing drug residue, and additional plastic baggies commonly used to contain narcotics.

- Officer Hart did not seize the paraphernalia at that time.

- Based on the items of drug paraphernalia in plain view, BPD had evidence that an offense had been committed and froze the apartment as a crime scene.

- Additional BPD officers entered the apartment to view items in plain view and to determine if BPD would obtain a search warrant for the apartment.

- BPD did not seize any evidence that that time.

- BPD officers talked to the defendant who stated that he was the only one residing in the apartment.

- [The] D[efendant] was arrested for possession of drug paraphernalia.

Findings Regarding the Search Warrant

- Officer Hart then left the scene and BPD obtained a search warrant signed at 3:12 AM on August 31, 2017.

- In the search warrant affidavit, Officer Versocki alleged that Firefighter Cook and BFD located what they believed to be drug paraphernalia inside the residence.

- BPD executed the search warrant and found the narcotics that are the subject of this case.

SUMMARY OF STATE'S RESPONSE

As a matter of first impression, the trial court and Court of Appeals were faced with the question of whether a law enforcement officer may step into the shoes of a firefighter when the firefighter observes drug paraphernalia and firearms in plain view while performing his firefighter duties. Both the trial court and Court of Appeals found that a law enforcement officer may do so in limited circumstances, such as those presented in the present case. Specifically, the Court of Appeals adopted the following rule:

> [L]aw enforcement officers may enter premises to seize contraband that was found in plain view by firefighters or other emergency personnel, at least if the exigency is continuing and the emergency personnel are still lawfully present.

This Court should likewise adopt this rule because it is reasonable and supported by Fourth Amendment precedent. This rule adequately balances individuals' privacy interests with the government's interest in protecting citizens and in adequate law enforcement. Law enforcement officers and firefighters should be able to work together while firefighters are performing their duties to best serve the public. Permitting law enforcement to follow in the footsteps of firefighters to secure contraband the firefighters observed in plain view while performing their duties and ensure the safety of the firefighters does not infringe on individual privacy rights any further than the initial intrusion by the firefighters. It also encourages proper treatment of incriminating evidence and the safety of public servants.

STATE'S RESPONSE TO APPELLANT'S POINT OF ERROR:

Appellant's Contention:

"In *Talent v. City of Abilene*, 508 S.W.2d 592 (Tex. 1974), peace officers were distinguished from firefighters, who '(have) no roving commission to detect crime or to enforce the criminal law.' Unlike fire marshals, who are peace officers, firefighters do not have general law-enforcement powers. Thus, absent an exigency that allows an officer to enter without a warrant, if a firefighter enters a home to extinguish fires or save lives and notices contraband in plain view, that firefighter's knowledge does not 'impute' to a peace officer, and the officer should be prohibited from entering the home without a warrant." *See* Appellant's Brief, 14.

State's Response:

Exigent circumstances permitted the initial entry of firefighters into Martin's apartment. When Firefighter Cook observed drug paraphernalia and firearms in plain view, he could have seized the items himself, but he opted to call law enforcement officers, trained in evidence collection and preservation, to assist. Officer Hart lawfully stepped into Cook's shoes to observe the contraband in plain view while the exigency of the fire persisted and ensure the firefighters' safety. The subsequent entry of law enforcement officers after the exigency had ceased was incidental to and a valid continuation of the original exigency. Martin's Fourth Amendment rights were not violated and the trial court properly denied his motion to suppress.

Arguments and Authorities:

I. Standard of Review

An appellate court reviews a ruling on a motion to suppress using a bifurcated standard of review. *Sims v. State*, 569 S.W.3d 634, 640 (Tex. Crim. App. 2019). A trial court's findings of historical facts are afforded almost total deference. *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). Likewise, determinations of mixed questions of law and fact that turn on credibility and demeanor are afforded almost total deference if they are reasonably supported by the record. *Id*. An appellate court reviews a trial court's determination of legal questions and its application of the law to facts that do not turn upon a determination of witness credibility and demeanor *de novo*. *Id.* When a trial court denies a motion to suppress, appellate courts will uphold that ruling if it is correct under any theory of the law applicable to the case. *See State v. Copeland*, 501 S.W.3d 610, 612-13 (Tex. Crim. App. 2016).

II. Fourth Amendment Law[1]

The Fourth Amendment protects individuals from unreasonable searches and seizures by government officials. U.S. Const. amend. IV. The reasonableness of a search is determined by balancing the individual's privacy interests against the

[1] The State notes that Martin's argument is confined to an alleged violation of his rights under the Fourth Amendment of the United States Constitution; he does not argue that his rights under the Texas Constitution or Texas statutory authority were violated.

government's interest in law enforcement. *Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007). There is a strong preference for searches to be conducted pursuant to a judicially-authorized warrant. *Id*. A warrantless search is presumptively unreasonable, subject to certain "jealously and carefully drawn" exceptions. *Georgia v. Randolph*, 547 U.S. 103, 109 (2006). In the absence of a warrant, the State bears the burden to prove that an exception to the warrant requirement applies. *United States. v. Robinson*, 414 U.S. 218, 243 (1973); *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003). Recognized exceptions to the warrant requirement include: (1) voluntary consent to search; (2) search under exigent circumstances; and (3) search incident to arrest. *McGee*, 105 S.W.3d at 615.

Police officers are not the only government officials who are subject to the requirements of the Fourth Amendment; as relevant to the case at hand, firefighters are likewise subject to its demands. *Michigan v. Tyler*, 436 U.S. 499, 504 (1978). Therefore, firefighters' warrantless entrance into a citizen's property must fall into one of the exceptions to the warrant requirement. *Id*. at 508-09. In light of the urgency firefighters face when confronted with a building fire, the United States Supreme Court has held that "[a] burning building of course creates an exigency that justifies a warrantless entry by fire officials to fight the blaze." *Michigan v. Clifford*, 464 U.S. 287, 293 (1984); *Tyler*, 436 U.S. at 509 ("Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning

structure to put out the blaze."). Additionally, firefighters may remain within the building for a reasonable time to investigate the cause of the fire and perform their other duties. *Clifford*, 464 U.S. at 293 n. 4; *Steigler v. Anderson*, 496 F.2d 793, 795–96 (3d Cir.), *cert. denied*, 419 U.S. 1002 (1974).

While firefighters are performing their duties, they may seize any incriminating object that comes into view, without a warrant, pursuant to the plain view doctrine. *Clifford*, 464 U.S. at 294. In order to seize an object in plain view, the record must show: (1) a prior justification for the intrusion, and (2) the incriminating nature of the item was immediately apparent. *See Horton v. California*, 496 U.S. 128, 138 (1990); *see also Ramos v. State*, 934 S.W.2d 358, 368 (Tex. Crim. App. 1996). As this Court has recognized, the plain view doctrine "is not really an 'exception' to the warrant requirement because the seizure of property in plain view involves no invasion of privacy and is presumptive reasonable." *Walter v. State*, 28 S.W.3d 538, 541 (Tex. Crim. App. 2000) (citing *Texas v. Brown*, 460 U.S. 730, 738-39 (1983)). Because the item is already in plain view, neither its observation nor its seizure involves any invasion of privacy. *Id.*

III. The trial court properly denied Martin's motion to suppress.

Generally speaking, Martin does not dispute the state of law outlined above. *See* Appellant's Brief, 35-36. Rather, Martin argues that firefighter Cook did not immediately recognize the items he saw in Martin's apartment as contraband and

that the exigency of the fire had dissipated by the time police officers entered his apartment. Martin asserts that because the plain view and exigency doctrines do not apply to the facts of this case, nor do any other exception to the warrant requirement, the police officers' entrance into his apartment violated his rights under the Fourth Amendment. However, Martin's argument is premised on his interpretation of the facts and does not afford the trial court's factual findings the deference they are entitled to.

A. Cook was lawfully in Martin's apartment and he saw contraband in plain view.

1. Cook's presence in Martin's apartment was justified by the exigency created by the fire.

The United States Supreme Court has held that citizens may retain a reasonable expectation of privacy in fire-damaged premises. *Tyler*, 436 U.S. at 505-06. "Privacy expectations will vary with the type of property, the amount of fire damage, the prior and continued use of the premises, and in some cases the owner's efforts to secure it against intruders." *Clifford*, 464 U.S. at 292. Although Martin's apartment had water and fire damage prior to the entry of firefighters and law enforcement, it was not completely devastated by the fire. Thus, Martin had a reasonable expectation of privacy in his apartment. *C.f.*, *id*. (noting no reasonable expectation of privacy remains in devastated property that is reduced to ash and ruins). Because reasonable privacy interests remained, the warrant requirement

applied and any entry by government officials was required to be made pursuant to a warrant or an exception thereto. *Id*. at 292-93.

However, as previously discussed, a fire creates the type of exigent circumstance to justify the warrantless entrance of firefighters into a home or apartment. *Tyler*, 439 U.S. at 509. The firefighters' right to be in the residence is not extinguished the moment the flames are put out. Rather, firefighters may remain in the residence for a reasonable time to complete their duties. *Clifford*, 464 U.S. at 293 n. 4. This is true of all firefighters, not just arson investigators or fire marshals. *Steigler*, 496 F.2d at 795–96. One such duty is ventilation of the premises, which involves opening doors and windows to remove the accumulation of smoke and heat, thus allowing firefighters to safely locate any individuals remaining in the building and to ensure the fire is extinguished. *Jones v. Commonwealth*, 512 S.E.2d 165, 168 (Va. 1999); *Commonwealth v. Person*, 560 A.2d 761, 767 (Pa. 1989). Ventilation requires firefighters to enter areas of the home beyond the immediate location of the fire. *Jones*, 512 S.E.2d at 168. Thus, a firefighter is lawfully present anywhere in the home in which it is reasonable to enter to facilitate the ventilation process. *See id*.

Here, Cook and other firefighters had entered Martin's apartment to extinguish a fire in the kitchen of the apartment. RR 2:8-9. The firefighters quickly put the fire out (RR 2:23); however, Martin's apartment had filled with smoke and it was necessary for the firefighters to ventilate the apartment. RR 2:8-9. The kitchen

itself did not have any windows. *See* RR 3:5-6, State's Exhibits 1-2 (Photographs of the Kitchen). Therefore, the firefighters had to locate windows in other rooms of the apartment to properly ventilate it. Cook entered the back bedroom of Martin's apartment in order to open the windows in that room. RR 2:9-10. Cook was lawfully in the back bedroom of Martin's apartment during the ventilation process. *Jones*, 512 S.E.2d at 168. Thus, the first prong of the plain view doctrine was satisfied in this case.

2. Cook viewed drug paraphernalia in plain view.

While attempting to ventilate the back bedroom of Martin's apartment, Cook saw a torch, "drug-like little baggies," a clear jar of unidentified pills, a glass with drug residue in it, and a butane lighter on the top of a dresser and in an open closet in plain view. RR 2:17. Cook testified that he has taken numerous classes on recognizing drug paraphernalia and had experience recognizing drug paraphernalia when responding to fires. RR 2:17-18. Based on his training and experience, he determined the items were drug paraphernalia. RR 2:18. In its findings of facts, the trial court made factual findings that the items Cook viewed constituted drug paraphernalia and were subject to seizure under the plain view doctrine. CR 16: Finding of Fact 4-5.

Martin does not argue that the items were not in plain view, but rather argues that their incriminating nature was not immediately apparent to Cook and the trial

court's findings are not supported by the record. *See* Appellant's Brief, 43. Martin's argument is based on Cook's testimony that he could not independently "verify that the substance he saw was illegal." *See* Appellant's Brief, 43 (citing RR 2:29). However, verifying the illegal nature of items is not a requirement of the plain view doctrine. *See Miller v. State*, 393 S.W.3d 255, 266 (Tex. Crim. App. 2012). The plain view doctrine requires that the incriminating nature of the item be immediately apparent. *See Horton*, 496 U.S. at 138. This does not require actual knowledge that the item is incriminating evidence; rather, it requires a showing of probable cause that the item is incriminating. *Miller*, 393 S.W.3d at 266 (the immediately apparent prong requires a showing that "it is immediately apparent that the item seized constitutes evidence—that is, there is probable cause to associate the item with criminal activity"); *see also Goonan v. State*, 334 S.W.3d 357, 361 (Tex. App.—Fort Worth 2011, no pet.). Probable cause, in this sense, requires that the facts available to the individual would warrant a man of reasonable caution to believe that the item may be contraband. *Goonan*, 334 S.W.3d at 361 (internal citation omitted). An official may rely on his training and experience to draw inferences and make deductions as to the nature of the item seen. *Id*.

Cook testified that he immediately recognized the items as drug paraphernalia. RR 2:18. Indeed, plastic baggies, such as the ones Cook saw, have been recognized as drug paraphernalia. *See, e.g.*, *Torres v. State*, 466 S.W.3d 329, 333 (Tex. App.—

Houston [14th Dist.] 2015, no pet.); *August v. State*, No. 14-16-00971-CR, 2018 WL 3469219, at *4 (Tex. App.—Houston [14th Dist.] July 19, 2018, pet. ref'd) (mem. op., not designated for publication). The unmarked pills were found near the baggies Cook knew were associated with drug sales and the glass with apparent drug residue on it. RR 2:17. Although Cook testified that he did not know what substance the pills were, he stated that firefighters are cautious of unmarked substances because they could be Fentanyl, a drug which can easily catch fire. RR 2:18. Martin's apartment also had several firearms located in plain view throughout it. RR 2:9-10. Given these facts, Cook had probable cause to conclude that the unmarked pills, baggies, and glass with apparent drug residue on it were associated with criminal activity. Contrary to Martin's assertion, the record supports the trial court's finding that Cook saw drug paraphernalia in plain view.

3. Cook could have seized the drug paraphernalia in Martin's apartment.

Despite the exigency that authorized Cook's presence and the fact that the items were in plain view, Martin argues that Cook could not have seized the drug paraphernalia because he was a "regular firefighter," not a fire marshal or arson investigator. *See* Appellant's Brief, 43-56.

While Martin correctly points out that the case in which the United States Supreme Court held that firefighters could seize items in plain view, *Michigan v. Clifford*, involved a fire investigator not a standard firefighter, he fails to

demonstrate how that role changes the Fourth Amendment analysis of the plain view seizure doctrine. Without reference to the type of firefighter conducting a search, the Court in *Clifford* stated "[i]f evidence of criminal activity is discovered during the course of a valid administrative search, it may be seized under the 'plain view' doctrine." 464 U.S. at 294. The Court noted that a valid "administrative search" is one that is necessary to determine the cause and origin of a fire and to ensure against rekindling, but may also include other tasks. *Id*. at 297. The Court concluded that the scope of a permissible search by firefighters "may be no broader than reasonably necessary to achieve its ends." *Id*. at 294-95. Cook's purpose in entering the back bedroom was to ventilate the apartment; entering the room for this purpose and observing objects in plain view is surely a valid "administrative search" under the Court's reasoning in *Clifford*. *Id*.

Although Cook is not a fire marshal or arson investigator, he was properly in Martin's apartment performing his required duties when he observed drug paraphernalia in plain view. Because Cook's intrusion into Martin's back bedroom was a valid part of his firefighter duties, he could have seized the drug paraphernalia he saw in plain view. *Id*. at 294. However, because Cook is not trained in evidence collection and he had safety concerns due to the presence of firearms, he retreated from the apartment, notified his superior, and called the Bedford Police Department for their assistance. RR 2:16.

B. Martin's Fourth Amendment rights were not violated by the subsequent entrance of law enforcement officers.

1. The exigency of the fire continued during Officer Hart's initial entry into Martin's apartment.

Despite recognizing the exigent circumstances that authorized the firefighters' entry into his apartment, Martin argues that the trial court and Court of Appeals erred in finding that there were exigent circumstances permitting law enforcement's subsequent entry. Martin notes that this Court has only recognized three exigencies which will exempt law enforcement officials from the warrant requirement. The three categories of exigent circumstances that justify a warrantless intrusion by police officers are: (1) providing aid or assistance to persons whom law enforcement reasonably believes are in need of assistance; 2) protecting police officers from persons whom they reasonably believe to be present, armed, and dangerous; and 3) preventing the destruction of evidence or contraband. *Gutierrez*, 221 S.W.3d at 685.

Martin's argument fails to recognize what the trial court and Court of Appeals properly recognized, that the exigency of the fire was ongoing when Officer Hart entered Martin's apartment. The trial court made an explicit finding that the fire department was still ventilating the apartment when Officer Hart was asked to enter the apartment. CR 17: Finding of Fact 7. This finding is supported by Officer Hart's testimony that the Bedford Fire Department's battalion chief had advised him that the firefighters were "still trying to ventilate the apartment," but that they had safety

concerns. RR 2:34. Officer Hart's testimony, and thus the trial court's finding, are further supported by Officer Hart's body-camera footage which shows the battalion chief advising Officer Hart of the ongoing ventilation efforts the firefighters were engaged in. *See* State's Exhibit 17 at 00:22-00:37 (Officer Hart Body-Camera Footage). In fact, the battalion chief told Officer Hart that the fire department could not continuing ventilating the apartment due the presence of drug paraphernalia and firearms. *See* State's Exhibit 17 at 00:22-00:27 (Officer Hart Body-Camera Footage). Thus, viewing the evidence in the light most favorable to the trial court's finding supported by the record, the exigency of the fire was still ongoing when Officer Hart entered Martin's apartment. *See Jones*, 512 S.E.2d at 168; *Person*, 560 A.2d at 767.

2. The Fourth Amendment permits Officer Hart to step into the shoes of the firefighters to observe contraband in plain view and ensure the safety of the firefighters.

As the Court of Appeals noted, "[t]he question remains whether the officers' entry [during a fire-related exigency] also passes constitutional muster." *See Martin*, 576 S.W.3d at 824. The Court of Appeals joined the majority of courts that have considered this question and held that it does. *Id*., *citing State v. Bower*, 21 P.3d 491, 496 (Idaho Ct. App. 2001), *abrogated in part on other grounds by State v. Islas*, 443 P.3d 274, 282–83 (Idaho Ct. App. 2019); *see Steigler*, 496 F.2d at 797–98; *United States v. Green*, 474 F.2d 1385, 1390 (5th Cir. 1973); *Mazen v. Seidel*, 940 P.2d 923,

927–28 (Ariz. 1997); *People v. Harper*, 902 P.2d 842, 846 (Colo. 1995); *State v. Eady*, 733 A.2d 112, 123 (Conn. 1999) (op. on reh'g); *Hazelwood v. Commonwealth*, 8 S.W.3d 886, 887 (Ky. Ct. App. 1999); *Person*, 560 A.2d at 765; *Jones*, 512 S.E.2d at 168–69; *State v. Bell*, 737 P.2d 254, 259 (Wash. 1987), *abrogated in part on other grounds by Horton*, 496 U.S. at 141-42. Specifically, the Court of Appeals described the rule as follows:

> [L]aw enforcement officers may enter premises to seize contraband that was found in plain view by firefighters or other emergency personnel, at least if the exigency is continuing and the emergency personnel are still lawfully present.

Martin, 576 S.W.3d at 824 (internal quotations omitted). The Court of Appeals applied the rule equally to firearms and contraband because both categories of items distract firefighters from their mission and police officers have more expertise in handling and securing these items. *Id*.

This Court should affirm the Court of Appeals' adoption of this rule and its application because it is reasonable and in line with Fourth Amendment precedent. The ultimate touchstone of the Fourth Amendment is reasonableness. *Fernandez v. California*, 571 U.S. 292, 298 (2014). The rule adopted by the Court of Appeals is a prime example of reasonableness in action. The interplay of firefighters and police officers when a fire department is fighting a fire is often necessary in order for firefighters to focus on their duties. For example, police officers are often on scene during fire emergencies to assist the fire department with traffic control and prevent

citizens from interfering with the firefighters' duties. *See Eady*, 733 A.2d at 120 (police officer directing traffic at fire scene were called into home to view drugs); *Harper*, 902 P.2d at 843-44 (police officers present at fire scene to control traffic and prevent interference with firefighters' activities were called into home to observe a substance firefighters believed to be marijuana). Further, as the above-cited cases indicate, it is relatively common for firefighters to find contraband in plain view while performing their duties. *See supra* at 29-30. Firefighters are not thoroughly trained in evidence collection or preservation. Nor do firefighters carry firearms or receive training in how to properly handle firearms. It is reasonable to allow firefighters to call law enforcement, whether already on scene or not, to assist them when firearms and contraband are found during a fire emergency, both for the preservation of evidence and the firefighters' safety.

Significant to the reasonableness of this rule is the diminished privacy interest individuals possess in their residences while firefighters are engaged in their duties. While a person retains an expectation of privacy in their home during a fire, it is but a *reasonable* expectation of privacy. *Clifford*, 464 U.S. at 294-95 (emphasis added). A person cannot reasonably retain the same expectation of privacy in areas that are necessary for firefighters to enter in the course of fighting the fire as they would ordinarily possess in their residence and property. *See id*. (discussing permissible searches following a fire which do not require a criminal warrant, indicating the

diminished privacy interest in the areas firefighters were required to enter). As is the case with all plain view seizures, if a firefighter observes contraband in plain view while lawfully in a fire-damaged residence, the viewing of that contraband involves no further invasion of privacy. *See Walter*, 28 S.W.3d at 541.

The United States Supreme Court has noted that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on … Fourth Amendment interests against its promotion of legitimate governmental interests." *Brown*, 460 U.S. at 739. Thus, the proper balance at issue here is the diminished expectation of privacy in an active fire scene against the government's interest in having police officers follow in the footsteps of the firefighters to properly handle firearms and secure contraband that is found while firefighters are engaged in their duties. *Id.* Police officers are properly trained in securing evidence and firearm safety, whereas firefighters are not. The State has a legitimate interest in preserving evidence of criminal activity, even if originally observed at the scene of a fire. *See Gutierrez*, 221 S.W.3d at 685. The State also has a legitimate interest in ensuring safe conditions for firefighters performing their duties. *Id*. In these circumstances, law enforcement is not invading the individual's privacy any more than the firefighters already have. Nor are police officers entering a home for the sole purpose of searching for evidence of criminal activity. Rather, firefighters are simply asking the law enforcement officers to secure contraband, which the firefighters were

allowed to seize themselves pursuant to the plain view doctrine, and ensure the firefighters' safety regarding the firearms. The balance of interests at play under these circumstances tips in favor of permitting this limited rule.

Further, in reference to exigent circumstances, this Court has noted that "the right to be present is not necessarily limited to just the officer or officers who actually dealt with the exigency that permitted the initial entry, but may extend to officers who have a different function from the original entrants." *Ricks v. State,* No. AP-77,040, 2017 WL 4401589, at *10 (Tex. Crim. App. Oct. 4, 2017) (not designated for publication).[2] Although *Ricks* involved an initial entry by law enforcement followed by an entry of other law enforcement officials, it is reasonable to extend its rationale to the present situation. The different function served by the firefighters and law enforcement should not prevent this Court from adopting this reasonable rule.

Martin argues that this rule allows for any sort of public official to invade a home after firefighters have lawfully entered to extinguish a fire. *See* Appellant's Brief, 56-59. However, as the Court of Appeals noted, the rule it adopted only permits law enforcement to step into the shoes of firefighters while the exigency of

[2] The States acknowledges that under Texas Rule of Appellate Procedure 77.3, this unpublished opinion has "no precedential value" and cannot be cited "as authority." Tex. R. App. P. 77.3. The State does not intend to suggest otherwise, but rather seeks to demonstrate that the reasonable nature of the rule adopted by the Court of Appeals is in line with a previous, albeit not binding, opinion of this Court.

the fire remains. *Martin*, 576 S.W.3d at 825. This limitation preserves the privacy interests that remain in an individual's home following a fire, while allowing for police officers and firefighters to work in unity to best serve the public. As discussed above, the trial court's findings of fact and the evidence in this case supports the conclusion that this limitation was not exceeded in the present case. *See supra* at 28-29.

Officer Hart entered Martin's apartment at the request of the Bedford Fire Department to assist them in handling the drug paraphernalia observed in plain view and ensure the safety of the firefighters. Officer Hart entered the apartment while the fire exigency was ongoing and did no more than observe what Cook had already seen in plain view and provide safety for the firefighters. Officer Hart's entrance did not violate Martin's rights under the Fourth Amendment.

3. The subsequent entry of additional law enforcement officers did not violate Martin's privacy rights.

Following Officer Hart's entry into Martin's apartment during the exigency created by the fire, Officer Hart "froze" the scene and called the narcotics unit to come view the drug paraphernalia that he observed. RR 2:45. Other law enforcement officers, including Investigator Versocki, arrived on scene and made entry into Martin's apartment, just as Cook and Officer Hart had previously done. RR 3:26, State's Exhibit 16 (Affidavit for Search Warrant). Investigator Versocki entered the kitchen, living room, and the back bedroom, observing the same drug paraphernalia

and firearms that had previously been viewed by firefighters and law enforcement officers. RR 3:23, State's Exhibit 16 (Affidavit for Search Warrant). Martin argues that the subsequent entries into his apartment, after the exigency of the fire had dissipated, violated his Fourth Amendment rights. *See* Appellant's Brief, 34.

Several Texas courts of appeals have addressed whether a subsequent search that is no more intrusive or expansive than the initial search is unreasonable merely because the exigencies have ceased to exist. *See Carmen v. State,* 358 S.W.3d 285, 294 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd); *Rothstein v. State,* 267 S.W.3d 366, 375-76 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd); *Johnson v. State,* 161 S.W.3d 176, 183 (Tex. App.—Texarkana 2005), *aff'd on other grounds,* 226 S.W.3d 439, 445 (Tex. Crim. App. 2007)); *Shoaf v. State,* 706 S.W.2d 170, 175 (Tex. App.—Fort Worth 1986, pet. ref'd). Each of these courts have held that a subsequent search under these circumstances does not violate the Fourth Amendment.[3] *Id*. As the Sixth Court of Appeals noted, "[o]nce the privacy of a residence has lawfully been invaded during an exigency, it makes no sense to require a warrant for other officers to enter and complete what officers on the scene could have properly done." *Johnson,* 161 S.W.3d at 183. A subsequent entry to view

[3] Although it does not carry any precedential authority due to its unpublished nature, the State notes that this Court recently acknowledged these cases in *Ricks v. State*, found "their reasoning persuasive," and likewise held that a subsequent search that does not exceed the scope of the original lawful entry does not violate the Fourth Amendment. 2017 WL 4401589, at *10.

contraband already seen in plain view during an initial search is "incidental to and a valid continuation of the initial exigent circumstances search." *Rothstein*, 267 S.W.3d 375-76; *see also Carmen*, 358 S.W.3d at 294; *Shoaf v. State*, 706 S.W.2d 170, 175 (Tex. App.—Fort Worth 1986, pet. ref'd). Indeed, even this Court has noted that "the lawfulness of a search is not determined by the number of times that the officers cross the threshold[,] [r]ather, it is whether the officers are engaged in objectively reasonable conduct under the circumstances." *Johnson v. State*, 226 S.W.3d 439, 445 (Tex. Crim. App. 2007).

Here, the law enforcement agents who entered Martin's apartment after Cook and Officer Hart observed the same drug paraphernalia and firearms already seen in plain view. Knowing the limitations of their entry, they merely observed and documented the items in plain view in order to use the information to obtain a search warrant to expand the search beyond items in plain view. The subsequent entries were objectively reasonable under the circumstances. Thus, no Fourth Amendment violation occurred when the narcotics unit, including Investigator Versocki, entered Martin's apartment to view the drug paraphernalia and firearms that had already been observed in plain view by the firefighters and Officer Hart during their initial lawful entries. *See Carmen*, 358 S.W.3d at 289; *Shoaf*, 706 S.W.2d at 173.

C. Conclusion

The trial court properly denied Martin's motion to suppress because at all relevant times, firefighters and law enforcement were lawfully in Martin's apartment and the drug paraphernalia was in plain view. The majority rule adopted by the Court of Appeals, which allows law enforcement to step into the shoes of firefighters when firearms and contraband are found in plain view during a fire exigency, is reasonable and supported by Fourth Amendment precedent. Further, the subsequent entrance by additional law enforcement officers did not exceed the law intrusion nor violate Martin's privacy rights.

PRAYER

Because the trial court properly denied Martin's motion to suppress, the State prays that this Court affirm the Court of Appeals' affirmance of the trial court's order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

A true copy of the State's brief has been e-served to opposing counsel, the Hon. Michael Mowla, michael@mowlalaw.com, P.O. Box 868, Cedar Hill, Texas 75106, on this, the 16th day of January, 2020.

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